

DAVID M. JACOBSON
OSBA#97290
JACOBSON.DAVID@DORSEY.COM
DORSEY & WHITNEY LLP
1420 Fifth Avenue, Suite 3400
Seattle, WA 98101
(206) 903-8800
(206) 903-8820 Fax
Attorneys for Defendant

FILED 08 MAY 5 3 38 PM DC ORF

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NICHOLAS MILLER,

Plaintiff,

v.

FRY'S ELECTRONICS, INC.,

Defendant.

CASE NO. **CV'08-0541-HA**
(SUPERIOR COURT NO. LV-08-0304-93)

NOTICE OF REMOVAL OF CIVIL
ACTION TO UNITED STATES
DISTRICT COURT UNDER 28 U.S.C. §
1441(A) (FEDERAL QUESTION)

S

TO: The Clerk of the Court

AND TO: Gary Abbott Parks, Plaintiff's Attorney

PLEASE TAKE NOTICE that Defendant Fry's Electronics, Inc. hereby removes the
above-captioned action from the Circuit Court of the State of Oregon in and for the County of
Clackamas to this United States District Court for the District of Oregon pursuant to 28 U.S.C. §
1441(a) and 1446 *et. seq.* Removal is proper on the following grounds:

1. Plaintiff filed a Summons and Complaint in Clackamas County Circuit Court, and

#21054
NOTICE OF REMOVAL OF CIVIL ACTION TO USDC - 1

DORSEY & WHITNEY LLP
U.S. BANK BUILDING CENTRE
1420 FIFTH AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101
PHONE: (206) 903-8800
FAX: (206) 903-8820

1 served it on April 3, 2008. True and correct copies of the Summons and Complaint, and Answer,
2 are attached as Exhibit A.

3 2. Plaintiff's Complaint includes a claim for benefits arising out of the terms and
4 conditions of Defendant's Vacation Benefit Plan, a welfare benefit plan covered by the
5 Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001, *et seq.*

6 3. Such claims are preempted by ERISA. Specifically, Defendant established and
7 maintained a Voluntary Employees' Beneficiary Association Trust, titled the Vacation Benefit
8 Plan (the "Plan") for the purpose of providing vacation benefits within the meaning and
9 governance of ERISA. Plaintiff and all putative class members were eligible to participate in the
10 Plan through their employment with defendantDefendant. Vacation benefits were paid pursuant
11 to the funded Plan and through the Plan's trust. ERISA governs the investment, management,
12 administration, and control of the Plan and the assets of the trust.

13 4. Section 514(a) of ERISA provide that, except for state laws regulating insurance,
14 ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any
15 employee benefit plan." 29 U.S.C. § 1144(a). State law claims that "relate to" an employee
16 benefit plan are completely preempted by ERISA. *Crull v. Glem Ins. Co.*, F.3d 1386, 1390 (9th
17 Cir. 1995). A state law claim "relates to" an employee benefit plan "if it has a connection with
18 or reference to such a plan." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 97 (1983).

19 5. Because Plaintiff's Complaint seeks to recover allegedly unpaid vacation benefits
20 that were provided by Defendant under the terms of the Plan, an "employee welfare benefit plan"
21 as defined in ERISA § 3(1), 29 U.S.C. § 1002(1), the Complaint "has a connection with" and
22 "relates to" an ERISA plan, and the vacation claims are therefore completely preempted by
23 ERISA.

24 6. Plaintiff's state law claims may be recharacterized as claims arising under ERISA
25 pursuant to the "artful pleading" doctrine. "A plaintiff may not . . . avoid federal jurisdiction
simply by omitting from the complaint federal law essential to his claim, or by casting in state

1 law terms a claim that can be made only under federal law. Jurisdiction is determined on the
 2 basis of the *well-pleaded* complaint. A complaint that is ‘artfully pleaded’ to avoid federal
 3 jurisdiction may be recharacterized as one arising under federal law.” *Olguin v. Inspiration*
 4 *Consolidated Copper Co.*, 740 F.2d 1468, 1472 (9th Cir. 1984) (citations omitted) (italics in
 5 original); *see also Young v. Anthony’s Fish Grottos, Inc.*, 830 F.2d 993, 997 (9th Cir. 1987)
 6 (“district court . . . properly looked beyond the face of the complaint to determine whether the
 7 contract claim was in fact a section 301 claim for breach of a collective bargaining agreement
 8 ‘artfully pleaded’ to avoid federal jurisdiction”).

9 7. In this case, recharacterization of Plaintiff’s unpaid vacation claim is appropriate
 10 because it is “artfully pled” to avoid federal preemption. 29 U.S.C. § 1132; *see also*
 11 *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 66-67 (1987) (common law contract and tort
 12 claims for alleged wrongful withholding of insurance benefits under an ERISA-covered plan are
 13 preempted); *Parrino v. FHP, Inc.*, 146 F.3d 699, 703-704 (9th Cir. 1998) (breach of the implied
 14 covenant of good faith and fair dealing and civil conspiracy claims predicted on alleged defects
 15 in defendant’s procedures for processing health care benefits are “completely preempted by
 16 ERISA”); *Olson v. General Dynamics, Corp.*, 960 F.2d 1418, 1420-23 (9th Cir. 1991) (fraud
 17 claim relating to level of benefits received under an employee plan was preempted by ERISA).

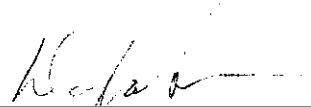
18 8. This action is a civil action over which this Court has original jurisdiction under
 19 28 U.S.C. § 1331 because it is founded on a claim of right arising under the laws of the United
 20 States (*see generally* 29 U.S.C. §§ 1001, *et seq.*) and may be removed to this Court by Defendant
 21 Fry’s Electronics, Inc. pursuant to 28 U.S.C. §§ 1331, 1441, and 1446.

22 9. Defendant timely filed this Notice of Removal after the service of Plaintiff’s
 23 Complaint, and have met all of the procedural requirements of 28 U.S.C. § 1446.

24 WHEREFORE Defendant requests that the action now pending against them in the
 25 Circuit Court of Oregon in and for the County of Clackamas be removed to this Court.

1 DATED this 5th day of May, 2008.

2 DORSEY & WHITNEY LLP

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4 _____
5 DAVID J. JACOBSON, OSBA#97290
6 Attorneys for Defendant
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EXHIBIT A

From:

To: T519252843029

04/04/2008 18:07

#424 P.003/008

Northwest WageLaw, LLC
1800 Blankenship Road Ste 475
West Linn, OR 97068

GARY ABBOTT PARKS
Attorney at Law
(503) 295-0431
(503) 655-2016 fax

Gary.parks@northwestwagelaw.com

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CLACKAMAS

NICHOLAS MILLER,

Plaintiff,

Case No. **LV 08 03 0493**

v.

SUMMONS

FRY'S ELECTRONICS, INC., a
foreign corporation,

Defendant

You are hereby required to appear and defend the complaint filed against you in the above entitled action within thirty(30) days from the date of service of this summons upon you, and in case of your failure to do so, for want thereof, plaintiff(s) will apply to the court for the relief demanded in the complaint.

**NOTICE TO DEFENDANT
READ THESE PAPERS CAREFULLY!**

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or an "answer". The "motion" or "answer" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the plaintiff.

If you have any questions, you should see an attorney immediately. If you need help in finding an attorney, you may call the Oregon State Bar's Lawyer referral Service at (503) 684-3763 or toll free in Oregon at (800) 452-7636.

STATE OF OREGON, County of Clackamas) ss.

I the undersigned attorney of record for the plaintiff, certify that the foregoing is an exact and complete copy of the original summons in the above entitled cause and that a true copy of the complaint on file with the court is attached.

SIGNATURE OF ATTORNEY FOR PLAINTIFF

Gary Abbott Parks, OSB #93392
1800 Blankenship Rd Ste 475
West Linn, OR 97068
(503) 655-2970

Attorney of record for Plaintiff

SUMMONS

Northwest WageLaw, LLC
1800 Blankenship Road, Ste 475
West Linn, OR 97068
Phone (503) 295-0431 Fax (503) 655-2016

From:

To: T518262843029

04/04/2008 13:07

#424 P.004/008

1 Northwest WageLaw, LLC
2 1800 Blankenship Road Ste 475
3 West Linn, OR 97068

4 GARY ABBOTT PARKS
5 Attorney at Law
6 (503) 285-0431
7 (503) 655-2016 fax

8 Gary.parks@northwestwagelaw.com

9 IN THE CIRCUIT COURT OF THE STATE OF OREGON
10 FOR THE COUNTY OF CLACKAMAS

11 NICHOLAS MILLER,

12 Plaintiff,

Case No. LV08030493

COMPLAINT

13 v.

WAGE CLAIM

14 FRY'S ELECTRONICS, INC., a
15 foreign corporation,

16 Defendant

CLAIM UNDER \$50,000.00

SUBJECT TO MANDATORY
ARBITRATION

17 Plaintiff alleges:

18 1.

19 Plaintiff is an individual at all times material residing in the state of Oregon.

20 2.

21 Defendant is a foreign corporation, hereafter referred to as "defendant" and who
22 was at all times material doing business in the State of Oregon and conducting regular,
23 sustained business activity in Clackamas County. At all times material, defendant knew
24 what it was doing and was free to act voluntarily.

25 3.

26 The Circuit Court of Oregon has personal jurisdiction of both plaintiff and
defendant because of their residence and principal place of business and because all
of the conduct complained of occurred in the State of Oregon.

COMPLAINT

Northwest WageLaw, LLC
1800 Blankenship Road, Ste 475
West Linn, OR 97068
Phone (503) 285-0431 Fax (503) 655-2016

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4.

At all times material, defendant was plaintiff's employer and plaintiff was defendant's employee.

5.

Before commencement of this lawsuit, plaintiff gave written notice of defendant's non-payment of wages and plaintiff's attorney gave defendant reasonable advance written notice of the claim for wages and that a lawsuit would be filed if the unpaid wages were not paid. More than 12 days have passed since plaintiff provided written notice of non-payment of wages to defendant pursuant to ORS 652.150. More than 30 days have passed since plaintiff's employment with defendant terminated. More than 10 days have passed since plaintiff attorney provided written notice of plaintiff's wage claims and that plaintiff's attorney would commence a lawsuit to recover the same.

6.

On 12 December 2007 defendant terminated plaintiff's employment without notice. At that time, plaintiff had worked more than one year for defendant. At the time plaintiff's employment terminated plaintiff was working more than 31 hours per work week and as part of plaintiff's compensation:

- 1.) plaintiff had accumulated 40 hours of "vacation time",
- 2.) plaintiff had accumulated 24 hours of "holiday pay", and
- 3.) plaintiff had accumulated 16 hours of "personal paid absence" time, all as part of his compensation.

7.

Plaintiff's regular rate of pay during plaintiff's final pay period was not less than \$7.80 per hour.

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/// /// ///

COMPLAINT

Northwest WageLaw, LLC
1800 Blankenship Road, Ste 475
West Linn, OR 97068
Phone (503) 295-0431 Fax (503) 655-2018

From:

To: T519252843029

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8.

After defendant terminated plaintiff's employment on 12 December 2007, all of plaintiff's wages then due were payable no later than close of business the next day, Thursday 13 December 2007.

9.

Defendant did not pay plaintiff all wages due and payable by close of business on 13 December 2007. Defendant did not deliver a final pay check to plaintiff until after 6 February 2008. That paycheck did not contain all wages due and payable to plaintiff.

FIRST CLAIM FOR RELIEF

(Unpaid Wages)

10.

Defendant's conduct as alleged above constitutes one or more violations of Oregon's Wage and Hour laws by failing to pay all wages due and payable. Defendant's conduct entitles plaintiff to recover at least \$7.80 per hour times 24 hours for holiday pay and 16 hours of paid personal absence pay for a total of 40 hours amounting to \$312.00 or such other amount as may be established by discovery and proved at trial. Plaintiff reserves the right to amend this complaint to allege such other amount.

11.

Pursuant to ORS 652.200, plaintiff is entitled to recover costs, disbursements, and reasonable attorney fees.

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COMPLAINT

Northwest WageLaw, LLC
1800 Blankenship Road, Ste 475
West Linn, OR 97068
Phone (503) 295-0431 Fax (503) 656-2016

From:

To: T519252843029

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#424 P.007/008

SECOND CLAIM FOR RELIEF

(Late Pay)

12.

Defendant's conduct as alleged above constitutes one or more violations of Oregon's Wage and Hour laws by failing to pay all wages due and payable by the time required by law and thereby entitles plaintiff to recover 30 days of unpaid continuation wages in the amount of \$1,872.00 along with costs, disbursements, and reasonable attorneys fees pursuant to ORS 652.200.¹

OTHER

13.

Pursuant to ORCP 68C(2)(a) plaintiff alleges the right to recover attorney fees under ORS 20.105 in the event that the substantive right to recover those fees accrues after the date this complaint is filed.

PRAYER

WHEREFORE, plaintiff prays as follows:

Upon the **First Claim for Relief (Unpaid wages)**:

1. Judgment against defendant for \$312.00 or such other amount as may be established by discovery and proved at trial;
2. Costs;
3. Reasonable attorneys fees;

¹ 30 days x 8 hours = 240 x \$7.80 = \$1,872.00

COMPLAINT

Northwest WageLaw, LLC
1800 Blankenship Road, Ste 475
West Linn, OR 97068
Phone (503) 285-0431 Fax (503) 655-2016

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To: T519252843029

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#424 P.008/008

- 1 4. Pre-judgment interest at the statutory rate;
- 2 5. Post-judgment interest at the statutory rate;
- 3

4 Upon the Second Claim for Relief (Late Pay):

- 5 1. Judgment against defendant in the amount of \$1,872.00;
- 6 2. Costs;
- 7 3. Reasonable attorneys fees;
- 8 4. Pre-judgment interest at the statutory rate;
- 9 5. Post-judgment interest at the statutory rate;
- 10

11 Such other relief as the court deems just and appropriate.

12
13
14 Dated: 3/19/08


15 GARY ABBOTT PARKS, OSB# 93392

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26
COMPLAINT

Northwest WageLaw, LLC
1500 Blankenship Road, Ste 475
West Linn, OR 97088
Phone (503) 285-0431 Fax (503) 655-2016